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IN THE

# Supreme Court of the United States.

October Term, 1906.

No. 580.

THE UNITED STATES, *Appellant,*

*v.*

CONRAD HEINSZEN and GUSTAV BROCKMANN trading as Partners under the Firm Name of C. HEINSZEN & CO.

## SUPPLEMENTAL BRIEF

Filed for Certain Claimants Having Interests Similar to those of Appellees.

HILARY A. HERBERT,
BENJAMIN MICOU,
Counsel.

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October Term, 1906.

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THE UNITED STATES, *Appellant*,
*v.*
CONRAD HEINSZEN and GUSTAV BROCKMANN, trading as Partners under the firm name of C. HEINSZEN & Co., *Appellees*.
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## SUPPLEMENTAL BRIEF

### of Herbert & Micou, — representing Certain Claimants having Interests Similar to those of Appellee.

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After the first decision in the *Warner Barnes* case the Government sent up a signal of distress, and asked a rehearing on the question of ratification, representing that that question had not been as fully presented as the Government thought, owing to its importance, it should have been, and for the further reason that the *Lincoln* and *Warner Barnes* cases were test cases involving similar claims for several millions of dollars, then pending in the Court of Claims. The rehearing was granted and the court sustained its former decision. Congress then passed the provision contained in the deficiency appropriation act of June 30, 1906, now here for consideration. The present case at bar was argued orally in the court below

by the Assistant Attorney-General for the Court of Claims, and he opened the case here. Printed briefs were filed by the Government in the court below and in this court. Following all this and after the opening of the case, the Honorable Solicitor-General suggested in oral argument that a different principle for determining the constitutionality of this legislation from the one applicable in a suit between private individuals applies here because of the sovereignity of the U. S. and the Honorable Attorney-General in his oral argument in closing elaborates this idea. Thus is sent forth what its brilliancy reveals to be another distress signal—and despite the adroitness worthy of the marvellous gift of expression possessed by the Honorable Attorney-General the proposition set forth by him at this late day, when analyzed, only shows how desperate the Government's case must be when it has to seriously take such a position.

The proposition in a nut-shell, is this:

That because the Government can not be sued save by its own permission, that after that permission has been given and while it still stands, claimants do not have the rights to their property, illegally taken and held by the sovereign, that they would have if such property had been similarly taken and held by a private individual; that constitutional protection can not be invoked and rights of plaintiffs have no firmer setting, in justice or equity, than before permission to sue the sovereign was granted. In effect that there are no rights, but only privileges, which rest, if upon anything, only upon the arbitrary basis of a smile or a frown. The Legislature needs but to nod, and the gracious privilege is gone. In fact even a nod is not necessary. This designated privilege is a will-o'-the-wisp which goes or comes at the beck and call of the sovereign will as expressed through the ingenuity of counsel. This lack of constitutional rights by the claim-

ants before this court is contended for, not on the ground that in these cases the sovereign has withdrawn permission to be sued, but on the ground that because the sovereign has the right to withdraw permission claimants never acquire any rights, and therefore have none to assert.

The argument of the Honorable Attorney-General does not go further than a discussion of the effect of the power of Congress to withdraw its permission to be sued, which permission and all that flows from it he terms privileges. He does not contend that the clause under consideration withdraws permission. He is too able a lawyer to do that. He merely tactfully heads towards the logical conclusion of his argument and drops the reins in the hope that the road may be taken. He does not suggest, or even hint, and on sober thought the idea is not to be entertained, that the provision, the constitutionality of which is in question, has taken from the Court of Claims jurisdiction in this class of cases. Yet his argument has no applicability whatever here unless it should be followed that far, and even then would not be applicable from the view of having taken away a right, but merely from the viewpoint of having taken away a remedy.

Where jurisdiction fails pending cases fall with it, whether such cases be suits against the Government or against individuals; but that has nothing whatever to do with the rights of litigants where jurisdiction attains.

At page 46 of the Government's brief, and discussing the power of Congress to ratify, it is said:

> "This is not an attempt to lay a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a tax collected then upon authority which all parties interested, tax payer and tax collector alike thought at that time to be legal."

This presents the Government's position, deliberately expressed, and what it styles an attempt to ratify and legalize a tax can not be distorted into an intention by Congress to repeal the applicability of the general jurisdiction clause of the Court of Claims to this special class of cases, and also the further provision from the Revised Statutes:

> "Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such governments in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."
>
> Revised Statutes, section 1068.

Withdrawal of jurisdiction that has once attached, whether to bring suits against the Government or against private individuals, could never be inferred from an attempt of the legislature either to itself exercise judicial powers or to interfere with the courts in the exercise of a continuing jurisdiction. Congress can give jurisdiction, and it can take it away over all subjects within its constitutional powers as well as over the subject of suits against the sovereign, but while the courts are open, are free agents and their jurisdiction attains Congress can not determine for the courts how they are to decide cases or the construction they are to put upon acts long since transpired from which rights have accrued.

Congress can cast an additional excise tax upon property that has already paid an excise tax, where, as in the case of *Patton* v. *Brady*, 184 U. S. 608, an additional excise tax had been placed upon articles which were at the time of the passage of the act, held and intended for sale.

The improperly designated tax exacted in this case

some six years ago was a payment made to secure the entries of merchandise into the ports of the Philippine Islands.

Importation is an act completed when merchandise has passed the customs and entered the country and a custom duty is a tax upon this privilege of entry.

Some of the merchandise brought into the Philippines was drinkables and eatables and no doubt long since consumed. Whether six years after the privilege had been exercised and the merchandise released and that not consumed gone, it is not known where, Congress could legally impose a tax upon the right of entry and enforce the same, not against the merchandise itself or whoever might now own it, where still in existence, but against the parties who originally entered the merchandise six years before and who are not now the possessors and owners thereof, presents a very different question from the one presented in the case of *Patton* v. *Brady supra.* It would also present the question of whether Congress could impose a tax on the privilege of importing where the importer at the time he exercised the privilege had had no notice of any such tax or any option as to whether he would subject himself to it.

But neither the question presented by that case nor the question that we have supposed, is the question here. Congress is not attempting to impose a tax now upon the privilege of having imported six years ago, but is attempting to legalize and ratify collections which when exacted were never taxes at all. What is attempted, and this is admitted, going by the statement from the Government's brief quoted above, is not to levy a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a collection made then.

As to this collection having been a tax, we of course

differ with the counsel for the Government. But the statement referred to shows the disclaimer by the Government of the idea that the present provision is an attempt to now lay a tax retroactively; and the question here is not whether Congress can impose retroactively an excise tax, but whether it can say for this court that that is a tax which the court has declared was no tax, and compel the acceptance of its fiat over the adjudged decision of this question in the *Lincoln* and *Warner Barnes* cases; which cases, as set forth by the Government in its petition for a re-hearing, were test cases involving similar claims then pending in the Court of Claims.

Mr. Justice Harlan in the case of *Koshkonong* v. *Burton*, 104 U. S. 668, quoted from in our first brief, held that an adjudication by the highest judicial tribunal of a State prior to the passage of the enactment relied upon to give retroactive effect at variance with what had been decided by the court, was an adjudication as to what was the law for that entire class of cases, which the legislature could not over-ride.

That to sue the sovereign requires permission none will deny, and in the only phase of that requirement applicable here permission is necessary to sue anyone. In other words, before suits can be brought there must be courts with jurisdiction to determine such suits, and in courts to which jurisdiction has never attained, or from which jurisdiction has been taken away, suits must fall, not because there is no right, but merely because there is no remedy. When permission is given to sue the Government, like where permission to sue is given against any other defendant, by the granting of jurisdiction over the parties and the subject-matter, it is spinning too fine to claim that the potency of sovereignty can turn rights into privileges. The permission which flows from jurisdiction gives, in a suit against the Government, the

same constitutional rights and protection to the plaintiff as are given to A as against B, where the courts have jurisdiction of A's suit; and those rights and that protection are perfect as long as the jurisdiction lasts; and such jurisdiction should not be held to be withdrawn by language any less clear as to its intent, than is the language by which the jurisdiction was bestowed.

It was earnestly and seriously contended by the Honorable Attorney-General that a chose in action as against the Government did not vest the same right as a chose in action against an individual, because of the necessity to have permission from the sovereign before you could sue. We think that what has just been said disposes of this contention, but it may be as well to emphasize what is claimed here.

That is, that this money we are claiming is not the Government's money at all but ours, and the legal title is vested in us. This is the clear status of the matter from the *Lincoln* and *Warner Barnes* cases. The courts are open to us. There is no question of the jurisdiction of the Court of Claims or of this court, and if by legislative fiat the title to this property is to become vested in the Government, then we are to be deprived of that property without due process of law as that term is applicable in judicial proceedings, and what is our property, and has been so adjudged in a test case to determine this class of cases, is to be devoted to the public use without any just compensation. We believe that a chose in action to be clearly such a valuable kind of personal property as should not be taken away without due process of law. The court has held a right of action to be property, in the case of *Angele* v. *Chicago, St. P., M. & O. Ry. Co.* 151 U. S. 138.

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